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ABSTRACT

The use of arbitration to resolve faculty appointment, retention, promotion, and tenure disputes is addressed, based on a review of specific university arbitration decisions. The arbitration literature reveals that faculty employment status decisions are made almost exclusively with reference to academic judgment. Attributes that are frequently examined include level and appropriateness of academic preparation, professional experience, evidence of research and scholarship, teaching competence, professional demeanor, and service to institution and community. Additionally, program needs and fiscal constraints have been considered in personnel decisions. Some collective bargaining agreements foreclose external arbitration in matters involving academic judgment, while some contracts contain clauses exempting decisions based upon academic judgment from arbital judgment. However, procedural grievances have been employed as a means of attacking the underlying academic judgment issues. It is concluded that the concern over the intrusion of an outside influence into the domain of academic judgment does not appear to be supportable and that arbitration has encouraged all parties to be aware of the procedural steps specified in the contract. (SW)

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A Review of Selected Arbitration Promotion, Retention and Tenure Decisions

by

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1. Introduction

Collective bargaining agreements are a relatively recent phenomenon in American higher education. As recently as 1966, there were only five such agreements in existence. (17) Since then, there have been more than a hundredfold increase in the number of post-secondary collective bargaining agreements. The reasons for this relatively rapid growth - declining enrollments, public confidence and budgets which in turn stimulate increasing faculty concern for job security - are well documented in the literature. (1 & 2)

In the absence of a model tailored expressly to the nuances of the traditional higher education environment, it is not surprising that industrial collective bargaining agreements were introduced without much modification. Levy posits that higher education

> ...contract clauses have drawn heavily from inductrial labor contracts. The use of traditional contract language probably results from familiarity with certain well-litigated contract clause formulations and the unions' desire to assert unequivocally their perceived union rights". (16, p.5)

While a natural expedient, this relatively unexamined application of the industrial model has resulted in conflicts with established faculty and administrative traditions within higher education. These traditions include academic freedom, peer evaluation relating to appointment, retention, promotion and tenure decisions, faculty dominance in curricular decisions, due process, and what might be labeled appropriately as "management rights'. These traditions or standards have been nationally documented by the American Association of University Professors in their Declaration of Principles (1915),

Statement of Principles (1940), and the Statement of Procedural Standards in Faculty Dismissal Proceedings (1958).(3)

The potential for conflict between a methodology and a relatively foreign dispute resolution process introduced from the outside is obvious. Collective bargaining contracts in higher education typically provide for these same standards which were traditionally, albeit to varying degrees, employed in the pre-collective bargaining environment. Obviously, concepts such as academic freedom, peer evaluation, etc. remain just as subjective under a collective bargaining agreement as they are in a more traditional environment. The major difference is the introduction of binding arbitration within the collective bargaining environment.(7 & 8)

The introduction of an outside party has been criticized for its perceived potential for undermining faculty and administrative prerogatives in making and implementing academically based decisions. (16) In addition, administrators tend to feel that binding arbitration undermines their managerial rights as well as their right to academic judgement.(9 & 11) The Perlin Case may serve to support these criticisms.(20) The arbitrator's award went beyond the contract restrictions or arbitration. The University held that since reappointment would entail the automatic granting of tenure, the only proper course if procedural faults were found would be to remand the matter back to the appropriate authorities for compliance with contractually specified evaluation. The arbitrator found that since the contract specified that a grievant be made whole he had no choice but to go

beyond the Nota Bene restrictions. He stated:

> "This conclusion was reached after much agonizing over the consequences of this remand and its impact upon the University's committee system that jealously guards its standard of excellence in the grant of tenure. But short of awarding a nominal remand that would continue the denial of rights to Miss Perlin and relieve the University from its restorative obligation, there is no other recourse under the Nota Bene (the arbitration clause).(20)

The University appealed and the award was subsequently over turned in court.

A second award also tends to support the criticism of outside and potentially disruptive influence. An Oakland Community College an instructor was discharged for a record of absenteeism.(54) The arbitrator acknowledged the grievant's defense was ambivalent in that it alledged administrative statements prioritizing material covered over attendance. He also discounted student criticism "I am inclined to view much of the student criticism as well as the student adulation with a grain of salt, particularly as it relates to the quality of instruction of the junior college level".(54,p.318) The arbitrator went on to make what might be construed to be his academic judgements in finding mitigating circumstances for the excessive class absences:

> "I find that Professor P-- missed classes excessively, but that this is mitigated by four very telling considerations, (1) the permissive attitude expressed by the College President towards the number of class meetings, assuming the material is covered, (2) the evidence that humanities courses lend themselves to work requiring audio-visual materials which can be used individually in the library, (3) the evidence that grievant generally tried to notify students of alternative assignments or arranged for a substitute, and (4) the evidence that the College administration was aware that grievant was under great nervous strain and in poor health during his sixth term (which was characterized by considerable absenteeism).(54, p.318-19)

These controversial awards may be the result of a difficulty of industrially oriented arbitrators in adjusting to the academic milieu.

Arbitration in higher education also introduces a unique source of conflict not found in the industrial environment. A grievant seeking redress through the arbitration process is in some cases, where both peers and the administration concur in a negative recommendation, in effect attacking his or her fellow union members. This obvious conflict was addressed in an early arbitration award:

> "Having adopted the format of unionism, college faculty members still may have much to learn from the prototypes of their relatively newfound type of organization. This dispute would seem utterly unreal to many trade unionists, for they would be loath to place themselves in the position of self-censure which their academic counterparts appear to have assumed with reference to their colleagues in their own union!"(52, p.536)

The same arbitrator next addressed the administration's contention that since the grievant was evaluated negatively by her peers, she had no basis for a grievance against the administration.

> "In final analysis though, a 'management', or whatever it may be called, cannot avoid its intrinsic responsibilities. The final responsibility for hiring and firing, for retention, and for non-retention, remains in the administration, and cannot 'cop out', as the saying goes, by contending that it turned this function over to 'the employes'.(52, p.536)

While these remarks have superficial validity, I would say that, at that time at least, the arbitrator failed to understand the nature of the higher education milieu.

2. Scope and Methodology

This brief review will examine the following faculty employment status issues - appointment, retention, promotion and the award of tenure - which have been addressed in arbitration awards. Special

emphasis will be given to the concept of academic judgement which generally describes the criteria employed in faculty employment status decisions. Traditionally, academic judgement is a criteria equally available in both peer and management decisions. While it is certainly a subjective concept, attempts have been made to contractually define it. The City University of New York (CUNY) second collective bargaining agreement states:

> "(A)cademic judgment' shall mean the judgment of academic authorities (including faculty, as defined by the Bylaws, and the Board) (1) as to the procedures, criteria and information to be used in making determinations as to appointment, reappointment, promotions, and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information."(10, p.424).

While there appears to be a relatively large body of arbitration awards within higher education, they have not publicly reported as frequently as their industrial counterparts. Therefore, I found it impossible to consult a single source for relevant arbitration reports. A search of three reporting services was conducted. They were The American Arbitration Association's Arbitration in the Schools; Bureau of National Affairs, Labor Arbitration Reports; and Commercial Clearing House, Labor Arbitration Awards. In addition, the ERIC and INFORM data bases, were searched for references to other awards and relevant materials.

Academic Judgment and Arbitration

Faculty employment status decisions are made almost exclusively with reference to academic judgment. The attributes examined, all be

they subjective, frequently include - level and appropriateness of academic preparation, professional experience, evidence of research and scholarship, teaching competence, professional demeanor and service to institution and community. In addition, both peers and management have included, on occasion, current and projected program needs and fiscal constraints. The validity for the latter two considerations was confirmed in an arbitration award.(28) Arbitrator Rubin found that a collge-wide faculty personnel committee was exercising academic judgment in failing to concur with a favorable departmental recommendation for reasons having nothing to do with the faculty member's qualification. It based its denial on projected institutional-wide needs. The means by which academic judgment was communicated influenced the outcome of a 1969 award.(52) Arbitrator Sembower found that the contract stated that teachers:

> "...shall be recommended for renewal of employment contract by the department chairman to the dean' and that department chairman 'shall include the views of the department in such recommendation. The school board is directed to give new contract to teacher whose contract was not renewed on basis of department chairman's recommendation that included only results of secret ballot vote by department members on question of renewal of grievant's contract. Requirement of expression of 'views'is not met by mere tabulation of faceless votes. Due process dictates necessity for the teacher to be able to compare 'views' reported to dean with what teacher might know to be the fact, and thereby be able to meet baseless charges; necessity is illustrated here, where just prior to vote, former department chairman erroneously or falsely reported that grievant had misrepresented her credentials when she first was employed."

In traditional as well as collective bargaining environments, faculty employment status decisions normally begin within the individual's departmental or unit peer group. The resulting recommendation may be subsequently reviewed by peer committees at succesive higher

levels of institutional representation and is implemented or denied by appropriate managerial hierarchy. In non-collective bargaining environments, a faculty member taking exception to the resulting decision may seek redress through traditional AAUP procedures or the courts.

Those covered by collective bargaining agreements generally seek their redress through the grievance/arbitration process. The early steps in this process are similar to the more traditional means. The grievant may petition a review and reconsideration at the challenged level or above. If an acceptable internal settlement cannot be reached, the matter typically goes to arbitration.

There are collective bargaining agreements which foreclose external arbitration in matters involving academic judgment. At Rutgers University, for instance, the issue is remanded to an advisory committee to the President.(6) This committee reviews the procedures and evidence employed in a manner similar to an appellate court. The internal grievance committee, composed of faculty and administration, review the process to determine if the grievant was given a fair and adequate hearing with reference to the facts presented. This form of resolution procedure tends to work as long as the faculty retains confidence in the integrity of the process.

Another contractual method employed to insulate academic judgment is the utilization of clauses exempting decisions based upon academic judgment from arbital judgment. the second CUNY contract specifies:

> "In the arbitration of any grievance of action based, in whole or in part upon such academic judgment, the Arbitrator shall not review the merits of the academic judgment or substitute his own judgment therefore,

> provided that the arbitrator may determine (i) that the action violates a term of this ASgreement, or (ii) that it is not in accordance with the Bylaws or written policies of the Board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the Bylaws or written policies of the Board."

The rationale for these arbital constraints is an attempt to balance the preservation of both peer and administrative discretion with individual due process rights.

In agreements where arbitration is employed, the contract itself, which may include existent institutional procedures and regulatory and relevant past practice is the basis for arbital review. The grievant may attach the decision on procedural and or substantive grounds. With the former, the grievant alledges that contractually stipulated procedures were arbitratily applied. With the letter he or she attacks the merits of the decision. This is, of course, an attack on the academic judgment employed. Many contracts, such as the CUNY example employed above, have sought to foreclose arbital review of the merits.

Grievances based upon procedural faults may only superficially limit the issues to the gravity of the alledged departure and the appropriate remedy. In practice, however, even when the contract prohibits the examination of academic judgment issues, procedural grievances are employed as a means of attacking the underlying academic judgment issues. This appears to have been done in the Perlin Case.

There have been cases in which the arbitrator had to be watchful of the de minimius doctrine. Arbitrator Milton Rubin found insufficient evidence to support the grievant's claim that he did not

receive appropriate notice of non-retention and that he was denied the benefit of the contractually specified evaluation procedure.(28) In addition, the grievant alledged that he was also discharged on an unsupported charge of incompetency. Arbitrator Rubin found, however, that no such procedural defect existed. The decision was based upon the academic judgment of a college-wide personnel committee and thus beyond arbital review.

As noted above, fiscal decisions may be considered within the domain of academic judgment. Finkin reports that an arbitrator held that it was an appropriate exercise of academic judgment for a CUNY department to allocate part-time funds to deserving graduate students rather than to part-time lecturers. (10, p.396-7)

Two other awards suggest that there are limits to the use of fiscal justification for dismissal. Arbitrator James V. Alturi held that the University had improperly denied a non-tenured professor to contractually proscribed evaluation procedures in response to a Board of Trustees order to economize.(46) The arbitrator found no reason to bypass the existing evaluation system. The Wayne County (Michigan) Community College Board of Trustees was found to have improperly terminated a part-time instructor under a contract clause that allowed a fifteen percent reduction in staff without cause when there was an excessive number of staff available.(50) The arbitrator found the Board hard pressed to justify the use of the fifteen percent rule since the grievant was the only instructor terminated under the clause.

In yet another fiscally based academic judgment, the arbitrator found that the University of Delaware's Dean of Education did not

violate the contract in the termination of six untenured faculty.(48) He used his academic judgment in deciding which academic program would be cut in response to a budget reduction. His decision was based upon a self study process which included a nine-member faculty committee to assist him. These awards would suggest that fiscal concern may be justly included within the realm of academic judgment, provided, however, that no injustice is done to the agreement.

The appropriate application of academic judgment was subjected to arbital review in two awards resulting from the implementation of tenure quota guidelines issued by the CUNY chancellor in October 1970. In the first, the college president was innocent of the charge of arbitrary application of procedure when he denied tenure to two instructors where records reflected satisfactory performance.(25) Arbitrator Friedman held that since the president had responsibility for tenure recommendations and in fact agreed with the quota system his was a valid use of academic judgment. The same arbitrator found that although a president of a sister institution had applied academic judgment in implementing the same quota system, his action was nevertheless procedurally deficient.(27) Specifically, the facts indicated that he employed his judgment in an arbittrary fashion. Originally he recommended the grievant for tenure. When the chancellor and a system-wide committee returned his recommendation for review, he reversed his decision. The arbitrator thus found evidence of coercion. A California State University arbitration provided additional support for the appropriate application of academic judgement in a quota system.(37) The president's action in establishing a numerical limit

on promotions to full professor was deemed within contractual limitations. Specifically, his decision not to request additional funds for the promotions was not unreasonable. Moreover, his decision reflected consideration of promotional patterns in previous years and the leveling of enrollment.

These awards define academic judgment as that judgment made by those employed in academic positions based upon academic criteria, albeit subjective. Thus, arbital scrutiny was limited to an examination of whether the academics involved exercised uncoerced discretion solely on the basis of academic criteria customarily employed. It is interesting that in both cases the arbitrator avoided examining the spcific criteria of academic judgment. Instead he limited his scrutiny to the conditions under which they were employed.

A job applicant grieved when a CUNY Dean of Faculty failed to support the recommendation of a faculty evaluation committee.(18) The denial was rendered within hours of receipt of the recommendation and without a complete dossier in his possession. The Board claimed that the Dean's action was protected by the contract's academic judgment restriction. The arbitrator found, however, that:

> "...(I)t is impossible for me to conclude that an 'academic' decision had been made rather than an abrupt, arbitrary administrative exercise of authority. To find otherwise would be to make any negative determination by one or another level of authority at the University a final and binding act completely invulnerable to review simply by reference to the status of the individual rendering it... The fact that it is a decision by the Dean of Faculty does not, however, per se make it an 'academic' type of determination.

The two CUNY quota awards and the dossier case above as well as the Chicago City College "tally report" all suggest that it is possible to attack the procedural aspects of academic judgment without addressing the merits of the judgment itself.

Academic judgment regarding appropriate academic credentials has lead to a number of arbitrations. In one of the earliest on record, the grievant's failure to pursue a doctoral degree coupled with a planned reduction in the employing department were valid contractual reasons for non-renewal.(19) Arbitrator John W. Teele found that Bryant College of Business Administration (R.I.) was not in violation of the contract when it denied reappointment and tenure to a faculty member that failed to earn a Ph.D. in his discipline.(35) The contract required that the faculty not holding the doctorate were expected to demonstrate progress in its attainment. Rhode Island Junior College, however, was found in violation of the contract when it denied the grievant promotion to full professor because his doctorate was from an unaccredited university.(41) The arbitrator found that:

> "As the grievant teaches in a two-year vocational college as opposed to a four-year general education institution, the fact that his degree was from an unaccredited institution should have been ignored by all parties evaluating him for promotion. What the agreement called for was a judgment as to whether, as a candidate with no doctorate, (the grievant) met and exceeded the standards for promotion to such a degree that he was the exceptrional candidate who should be promoted although a doctorate is normally required."

Dismissals because of a lack of competency in teaching have also been subjected to arbital review. Wildebush found that CUNY was not in violation of the contract when it declined to reappoint a non-tenured lecturer.(22) The Board presented substantial evidence that

enrollment in the grievant's classes was consistently abnormally low. In addition, the arbitrator found that the grievant's post-notice behavior provided sufficient reason for non-reappointment. The basis for non-renewal was sustained.

In another CUNY case the grievant claimed deficiencies in the observation and evaluation procedures and discrimination on the basis of race, sex and union activity.(23) The arbitrator found the Board charge of professional incompetency justified and thus an appropriate dismissal. It is interesting to note that the grievant herself admitted she found her evaluations unfavorable. This case suggests that grievances of questionable justification may be placed simply because the vehicle is available under the contract.

In yet another CUNY case, the Board was found in violation of the contract when the grievant was not given an opportunity to contest his unsatisfactory performance evaluation.(30) This employee was found to have the full-time contract equivalent to tenure. Thus, he could only be terminated with a contractually specified due process hearing. The arbitrator found that the confering of a certificate of Continuous Employment was equivalent to tenure as defined by the implied intent of the framers of the contract.

Documented poor teaching was found to outweigh even minor procedural errors in another CUNY case.(24) The grievant's charge that the Board's arbitrary application of contractually specified evaluation procedures was not sustained when weighted against the unanimous peer evaluation and against his teaching performance.

Ironically, an incompetency grievance CUNY appears to have lost comes from a non-teaching administrative staff member.(31) The reasons

for sustaining the grievance was that the Board failed to inform the grievant it was dissatisfied with his work prior to the dismissal notice. Moreover, in his evaluations he was praised for his work. The arbitrator pointedly noted that:

> "If (the grievant) had been falling down so badly in his areas of administrative responsibility, one would expect that he would have been told so with some specificity, not just to encourage him to improve his professional performance, but also to make a record on which management could reasonably base a non-reappointment decision." The grievant was not made aware at any time that his job was in jeopardy."

These awards suggest the incompetent charges can be successfully pursued provided the required procedural steps are followed.

A dismissal at St. John's University was based upon the faculty members professional conduct rather than his teaching ability.(43) The grievant, whose contract was not renewed, was shown to have comitted a number of actions which were judged breaches of professional integrity. The arbitration panel found that the grievant engaged in conduct which was unbecoming to his role as a university professor. Further, the grievant was shown to have substantially altered statements prepared for use by another organization. Lastly, he had publicly advertised the availability of his services. This was taken to be an indication of his willingness to break his existnet contract. In the face of the evidence submitted, the arbitration panel denied his charge that his academic freedom had been violated and sustained the dismissal. The panel did recognize that the university failed to follow with its own regulation requiring a hearing prior to dismissal. The panel outlooked this breach and observed that "he who seeks equity must come with clean hands."(43)

Two faculty members at Schoolcraft College were denied tenure without reference to the contractually required teaching evaluation procedures which had been followed for each of them.(33) The administration charged that their personal conduct, which had a direct bearing on their relationship with students and which was the subject of reprimands, was th basis for denial of tenure. The arbitrator reinstated them because of the lack of reference to their teaching evaluation. He did find their personal conduct to display a lack of professional integrity and upheld the reprimands. The arbitrator found that "the grievants' rights as citizens must be respected, but their conduct as teachers as it affect(ed) their school (was) subject to managerial control."

A review of the foregoing would again suggest that administrations have a relatively wide degree of discretion in evaluating employee behavior provided appropriate documentation is provided.

One of the time honored prerequisites of higher education faculty has been outside employment. Two arbitration awards address such employment. In the first case a Chicago City College instructor, as a condition of employment, agreed to reduce his teaching load at a neighboring institution to one-half time.(38) Subsequently, the Chancellor learned that the grievant held tenure at the other school and ordered non-renewal. The arbitrator found that since the original offer placed no restraint on tenure the dismissal was invalid. However, since the grievant failed to honor his promise to reduce outside employment to the contractually specified level, he was not entitled to any further remedy.

A case with a union discrimination overtone was prompted when Bryant College of Business Administration dismissed a full-time tenured instructor for retaining a second full-time position with his Union.(34) The arbitrator found that the outside job was indeed full-time. The contract limited outside employment to one day per week. The President was found to have given the grievant adequate opportunity to choose between the two positions. The arbitrator noted that the grievant was not denied due process when the President processed the dismissal after a faculty Rank and Appointment Committee failed to provide its recommendation within an acceptable deadline.

Lastly, written and oral promises regarding future employment prospects have influenced arbitration of academic judgment disputes. Arbitrator Epstein found that three non-tenured faculty members were not given proper and timely notice of non-renewal.(40) The Board contended that such notices were unnecessary since the three were on one year self-terminating contracts. The Union proved, however, that one of the grievants had been informed in writing that her contract would be renewed and the two other grievants were told they would be placed on a priority rehiring list after receiving favorable evaluations. The Board's position that it could not rehire the three because of budget constraints was disproved by its hiring of four new instructors. Thus, the Board was found to have acted in bad faith.

An opposite award was made in a State University of New York (Binghamton, N.Y.) and Senate Professional Association Arbitration. (44) The President ignored a Senior Personnel Committee recommendation that a professor at the end of a two year appointment be

continued with tenure. The arbitrator found that the President operated within the bound of the contract. Evidence was presented that the grievant was fully aware of the contract self-terminating condition and was not subject to renewal on the basis of other academic judgment criteria.

The Commonwealth of Pennsylvania was held in violation of its contract when it failed to fulfill its promises made to a mathematics professor.(56) The professor was orginally hired into a one year temporary appointment but with the promise of the first permanent position to open within the department. He was given a subsequent one year temporary appointment. During that year the incumbent chairman retired, thus creating a permanent position. The Administration withdrew that position from the department and gave the grievant a notice of termination. The arbitrator found a lack of good faith in honoring promises made and ordered reinstatement.

4. Conclusion

Concern over the intrusion of an outside influence into the previously sacrosanct domain of academic judgment does not appear to be supportable. In cases where the parties perceive an unjustified intrusion, the court as in the "Perlin case" provide a means of remedy. If anything, the introduction of arbitration has encouraged all effected parties to be mindful of the procedural steps specified in the referent contract. At the same time, arbitrators appear to have become more sensitive to the nature of the beast.

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Source: Bureau of National Affairs

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52. Commonwealth of Pennsylvania and Association of Pennsylvania State College and University Faculties, 65-LA-911.

53. Oakland Community College and Oakland Community College Faculty Association, 58-LA-316.

54. Wayne State University and American Association of University Professors, Wayne State Chapter, 68-LA-1085.

Source: Commercial Clearinghouse

55. Commonwealth of Pennsylvania (The) and Association of Pennsylvania State Colleges and University Faculties/Pennsylvania Association for Higher Education (APSCUF/PAHE), 76-1-ARB-8016.

56. Westmoreland County Community College and Pennsylvania State Education Association, 78-1-ARB-3084.